demnity readily implied from a request to act as trustee. It is difficult to contend that a person merely by becoming a beneficial owner thereby subjects himself to certain duties to the legal owner. Being a holder of the beneficial interest does not always necessitate incurring the liabilities of legal ownership, for one can take an under lease for one day less than the original term of a lease, and not be liable on its covenants, though practically the entire beneficial interest has passed. Further there is no strong reason of convenience against the view that the trust relation is unilateral, because a person becoming trustee must be taken to know that liability is often consequential on legal ownership, and accordingly he should safeguard himself by some provision for indemnity. It would scarcely be contended that the legal owner in this case could by a bill in equity have forced the legal title on the defendant. The latter could well say that he did not buy that, and does not want to have anything to do with it. Yet that is practically the result of the principal case. By it an equitable owner is placed effectively in the same situation as a legal owner, for on its principle the liquidator could enforce any legal liability of the trustee by an equitable execution against the *cestui que trust*. It would be interesting to see whether the court in an analogous case in which the *trust res* consisted of land would similarly throw the burden on the beneficial owner. To do so would be in violation of the principles governing trusts of land, and would compel the court to disregard a decision by Lord Cottenham holding that an equitable mortgagee of a lease cannot be forced to take an assignment of the lease, or be held liable on its covenants. *Moore* v. *Greg*, 2 Phillips, 717. Yet it would be difficult for the court to find a satisfactory distinction. The case, in short, seems but another illustration of the tendency at times manifested by even the most conservative tribunals *judicium dare* and not *judicium dicere*.

RECENT CASES.

ADMIRALTY — MUNICIPAL CORPORATIONS — TORTS OF PUBLIC AGENTS. — A city fire-boat on the way to a fire, through the negligence of those in charge, ran into and injured another vessel. *Held*, that the common law rule, holding that the city is not liable for the negligence of its servants while engaged in a public service, is inapplicable in admiralty. *Workman* v. *New York*, 21 Sup. Ct. Rep. 212. See NOTES, 14 HARV. LAW REV. 450.

BANKRUPTCY — GENERAL ASSIGNMENT — RIGHTS OF CREDITORS. — A debtor voluntarily conveyed property to a trustee for the benefit of creditors, securing by the deed a fraudulent debt to his wife. The plaintiff brings a bill to have the deed set aside as to voluntary debts. *Held*, that the plaintiff may attack a debt secured by the deed at the same time that he asserts his own rights as a beneficiary. *Runkle's Admin.* v. *Runkle*, 37 S. E. Rep. 279 (Va.).

In general, a grantee under a deed cannot accept its benefits, and reject any burdens which it imposes. *Vickerie* v. *Buswell*, 13 Me. 289. Accordingly it has been held that a creditor, affirming part of a voluntary assignment by claiming under it, cannot disaffirm the rest. *Pratt* v. *Adams*, 7 Paige, 615, 641; *Swanson* v. *Tarkington*, 7 Heisk. 612. The general rule, however, seems to be improperly applied to these cases, for the attacking creditor does accept the deed *in toto* as far as it is legal, and is not rejecting any legal burden. He is merely endeavoring to strike out improper provisions from the deed. In this view of the matter, and considering the better protection afforded to creditors thereby, the result reached in the principal case seems

preferable. It is also supported by some authority. *Starr* v. *Dugan*, 22 Md. 58; *Lockhard* v. *Brodie*, 1 Tenn. Ch. 384, 388 (*semble*).

BANKRUPTCY — PROVABLE CLAIMS — FUTURE RENT. — *Held*, that under the Bankruptcy Act of 1898 rent to accrue after the bankruptcy of a lessee is not provable against his estate, not being a fixed liability absolutely owing at the time of the filing of the petition, or such an unliquidated claim as may be liquidated and proved under sec. 63 b. *In re Mabler*, 3 N. B. N. Rep. 39 (Dist. Ct., Mich.). See NOTES, 14 HARV. LAW REV. 457.

BANKRUPTCY — STATE INSOLVENCY LAWS — SUSPENSION BY FEDERAL ACT. — A debtor made a general assignment for the benefit of creditors under a state statute which merely regulated such assignments, and made no provision for a discharge of the debtor. Subsequently a creditor sought to garnishee the goods in the hands of the assignee, alleging that the state statute was suspended by the Federal Act. *Held*, that the statute was not so suspended. *Patty-Joiner* v. *Cummins*, 59 S. W. Rep. 297 (Tex., Civ. App.).

State insolvency laws are suspended upon the passage of a national bankruptcy law, but a local statute which is not in conflict with the Federal law remains in force. That a statute has for its object some of the results brought about by a bankruptcy law is not a fatal objection. It has been held that a poor debtor's law relieving a debtor from arrest upon the surrender of his goods for the benefit of his creditors is not suspended. See *Stockwell* v. *Silloway*, 105 Mass. 517. Moreover a general assignment for the benefit of creditors is perfectly legal at common law; and the fact that such an assignment is made pursuant to a statute which merely regulates the transaction should not render it void. Any general assignment is an act of bankruptcy, and the trustee may claim the property of the assignee. *In Re Gutwillig*, 92 Fed. Rep. 337. Until, however, it is attacked in bankruptcy proceedings, the assignment should stand. The present case, therefore, is correct on principle and authority. *Mayer* v. *Hellman*, 91 U. S. 496.

BILLS AND NOTES — SIGNATURE GIVEN UNDER MISTAKE AS TO CONTENTS. — The plaintiff prepared a note containing a different contract from that which the defendant had previously agreed to sign, and presented it to the defendant, who negligently signed it without reading, supposing it to contain the contract agreed upon. *Held*, that no actual fraud was shown, and that the defendant, being the victim of his own negligence, was liable on the note. *Walton Guano Co.* v. *Copelan*, 37 S. E. Rep. 411 (Ga.).

When one is induced to sign a note by a fraudulent misrepresentation of the payee as to its nature or contents, his liability to a holder in due course depends on the question of negligence. *Foster* v. *MacKinnon*, L. R. 4 C. P. 704; 14 HARV. LAW REV. 463. In such cases the defendant never in fact made the contract in question, since, as the other party well knew, he never intended to do so; but in case of negligence he is estopped to deny his liability as against one who innocently relied on his signature. See 11 HARV. LAW REV. 472. In the principal case, whether or not the plaintiff intended to induce the defendant's mistake, it is tolerably clear that the plaintiff was aware of it at the time of the signing. This would seem quite enough to make his conduct fraudulent. See BIGELOW ON FRAUD, 11, 12. But that question is not here important. The defence is not fraud, but "never contracted," and there can be no estoppel, since the plaintiff, knowing the mistake, obviously had no right to rely on the defendant's signature. The decision seems therefore erroneous.

CARRIERS — NEGLIGENCE — RELATION OF CARRIER AND PASSENGER. — The plaintiff, a passenger on defendant's train, got off at a station in the night, intending to remain there till morning. Almost immediately afterwards she was injured through defendant's negligence in keeping the station. *Held*, that even if she would have had no right to remain till daylight, she is not barred by her intention to do so. *Chicago, etc. Ry. Co.* v. *Wood*, 104 Fed. Rep. 663 (C. C. A., Eighth Circ.)

A railroad company is liable for injuries resulting to its passengers from its negligent failure to keep its station properly. *Watson* v. *Oxanna Land Co.*, 92 Ala. 320; *St. Louis S. W. Ry. Co.* v. *Griffith*, 12 Tex. Civ. App. 631. Ordinarily the liability continues till passengers have left the premises. *Gulf, etc. Ry. Co.* v. *Glenk*, 9 Tex. Civ. App. 599; *Cross* v. *Lake Shore, etc. Ry. Co.*, 69 Mich. 363. But if the traveller remains in the station an unreasonably long time, the railroad's liability to him as pas-

senger then ceases. *Davis* v. *Houston. etc. R. R. Co.*, 59 S. W. Rep. 844. Since, however, the plaintiff in the present case had as yet done nothing not perfectly justifiable, she was clearly in possession of all her rights as passenger, and the decision thus is perfectly sound. Her bare intention to do an act in the future which would deprive her of the rights of a passenger cannot affect the liability of the defendant.

CONFLICT OF LAWS — JURISDICTION QUASI IN REM. — A wife brought suit to have alimony allowed her out of certain property of her husband, who had deserted her, and become domiciled in another state. A preliminary injunction was granted restraining defendant from disposing of the property in question. *Held*, that the court thereby, without seizure or attachment, acquired jurisdiction to create a charge on the property in favor of the plaintiff. *Benner* v. *Benner*, 58 N. E. Rep. 569 (Ohio). See NOTES, p. 535.

CONSTITUTIONAL LAW — FIFTH AMENDMENT — RIPARIAN RIGHTS. — A government pier, built opposite to the plaintiff's riparian land for the purpose of facilitating navigation, destroyed his access to the stream. *Held*, that this was not a taking of property within the Fifth Amendment. *Scranton* v. *Wheeler*, 21 Sup. Ct. Rep. 48. See NOTES, 14 HARV. LAW REV. 451.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ORIGINAL PACKAGE. — The plaintiff in error imported into Tennessee a number of paper packages of cigarettes, each package containing ten cigarettes. These packages were transported loosely, in an open basket belonging to the carrier. *Held*, that, on the sale of one of these packages in Tennessee, the plaintiff in error was properly convicted, under a Tennessee statute, which forbade all sales of cigarettes. *Austin* v. *Tennessee*, 21 Sup. Ct. Rep. 132.

It may well be doubted whether the true view is not that the commerce clause of the Constitution of the United States should never interfere with a state's police regulations. 2 Thayer's Cases on Constitutional Law, 2191. The Supreme Court of the United States has decided, however, that, in the absence of action by Congress, a state cannot by a general prohibitory statute constitutionally prevent goods imported from another state, from being sold by the importer in the original package. *Leisy* v. *Hardin*, 135 U. S. 100. This doctrine was considerably qualified by the decision that it does not apply to a state statute forbidding sales of oleomargarine made in imitation of butter. *Plumley* v. *Mass.*, 155 U. S. 461; 8 HARV. LAW REV. 353. It has nevertheless been reasserted against a general prohibitory law. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. The principal case, however, greatly limits the importance of the general doctrine even in such cases. The court goes on the ground that the transaction was a palpable subterfuge, and that the package of cigarettes was not an original package, within the constitutional meaning of that term. The result of this would seem to be that the original package doctrine does not apply to packages smaller than the customary unit of shipment, and, therefore, does not in general allow sales at retail. Such a qualification seems hardly logical, and not easy of application, but, nevertheless, is scarcely to be regretted, in view of the questionable soundness of the whole doctrine.

CONSTITUTIONAL LAW — JURISDICTION — INTEREST OF PARTIES. — *Held*, that the Massachusetts Land Registration Act of 1898 is not unconstitutional as depriving of property without due process. *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71.

On writ of error to the Supreme Court of the United States *held*, that the plaintiff in error has not shown that he was injured, and that, therefore, he has no sufficient interest to give the court jurisdiction. *Tyler* v. *Judges*, 21 Sup. Ct. Rep. 206. See NOTES, p. 529.

CONTRACTS — BREACH AS TO ONE INSTALMENT — RIGHT TO RESCIND. — Under an instalment contract, the plaintiff refused to pay for the third instalment on delivery as stipulated. *Held*, that there is nothing in plaintiff's conduct to indicate a design not to perform in the future, and that therefore the defendant is not entitled to repudiate the entire contract. *West* v. *Bechtel*, 84 N. W. Rep. 69 (Mich.). See NOTES, p. 537.

CONTRACTS — COVENANTS — DEFENCE OF FRAUD. — *Held*, that a release under seal cannot be impeached in an action at law on the ground that the plaintiff was induced

to execute it by fraud. *Hill* v. *Northern Pacific Ry. Co.*, 104 Fed. Rep. 754 (Circ. Ct., Wash.).

Fraud was at common law no defence to an action at law on a specialty, unless it affected the execution so that it could be shown under *non est factum*. See 9 HARV. LAW REV. 51. This rule has been generally changed by statute or by judicial decision, *Partridge* v. *Messer*, 14 Gray, 180, so that resort to equity for relief is no longer necessary, but it is still law in the Federal courts. *George* v. *Tate*, 102 U. S. 564. The same principle is clearly applicable where, instead of attempting to defeat an action on a specialty by showing fraud, the plaintiff is trying, as in the present case, to invalidate a release under seal. It has been held, however, that the common law was more liberal in allowing the defence in such cases, and that accordingly the Federal courts would do so. *Wagner* v. *National Life Ins. Co.*, 90 Fed. Rep. 395. The court in the principal case rightly refuses to follow this decision, which is without logical basis, and, although apparently having some support, is not established on authority. *Connor* v. *Dundee Works*, 50 N. J. 257.

CONTRACTS — NON-PERFORMANCE AS A DEFENCE — IMPLIED CONDITIONS. — X gave his note for $1000 to Y in consideration of Y's promise to discharge certain claims of third persons against X, and pay X the remainder of the $1000. No time was set for performance by Y, but though a reasonable time had elapsed, Y never paid the claims. *Held*, that the two promises were independent, and Y's failure to perform his promise is no defence to an action on the note. *Tronson* v. *Colby Univ.*, 84 N. W. Rep. 474 (N. D.).

The doctrine making non-performance by the plaintiff a defence in an action on a contract was originally worked out through the formula of implied conditions, the question being therefore treated as one of construction. Accordingly much stress was laid on such circumstances as the fixing of the time for performance. *Pordage* v. *Cole*, 1 Will. Saund. 319 l, and note ib. 320 a. In several cases also, some of them not yet overruled, the courts refused to apply the doctrine to a suit on a note or bond. *Spiller* v. *Westlake*, 2 B. & Ad. 155. See LANGDELL, SUM. CONT. § 117. The American authorities are mainly *contra*. *Fort Payne, etc. Co.* v. *Webster*, 163 Mass. 134. Though the language of implied conditions is still generally employed, the modern decisions, especially in this country, have made the defence turn entirely on the materiality of the breach. *Norrington* v. *Wright*, 115 U. S. 188. The true ground for these cases seems to be the manifest injustice of allowing one who has himself committed a material breach to compel the other party to perform. See 14 HARV. LAW REV. 424. The same principle applies to cases, which the old theory will not explain, where a breach by the plaintiff, though not yet committed, is reasonably certain to occur. *James* v. *Burchell*, 82 N. Y. 108. The reasons for the decision in the principal case are not distinctly stated, but the result is unfortunate and irreconcilable with the weight of American authority.

CONTRACTS — WARRANTY — DAMAGES FROM LOSS OF CROP. — Seeds sold with a warranty that they would grow were planted, but produced no crop. *Held*, that the measure of damages is the price paid, the expense of planting, etc., and a fair rent of the land, less what it could have been rented for after the failure of crop was discovered, and that the value of the crop that should have been raised cannot be considered. *Reiger* v. *Worth Co.*, 37 S. E. Rep. 217 (N. C.).

If the result of such a breach of warranty is a crop deficient in quality only, the damages are of course the difference in the value of the crop. *Wagstaff* v. *Shorthorn Dairy Co.*, 1 Cab. & E. 324. Where the deficiency is in both quality and quantity, or in quantity alone, the same rule is applied. *Passenger* v. *Thorburn*, 35 Barb. 17; *Flick* v. *Wetherbee*, 20 Wis. 392. It is clearly an objection to these latter cases that damages based on deficiencies in quantity are speculative in their nature. This, however, seems on the whole not of sufficient importance to warrant denying redress to one who has undoubtedly been damaged. There appears to be no valid distinction between these cases and cases like the present. The weight of authority where no crop at all is produced is nevertheless in accord with that decision in holding such damages too speculative. *Ferris* v. *Comstock Co.*, 33 Conn. 513; *Butler* v. *Moore*, 68 Ga. 780. *Contra*, *Page* v. *Pavey*, 8 C. & P. 769.

CORPORATIONS — ABUSE OF FRANCHISE — QUO WARRANTO PROCEEDINGS. — The trustees of a college leased it to a man who sold degrees, signed by the trustees, without regard to the merits of or the work performed by those on whom they were

conferred. *Held*, that this was such an abuse of its corporate franchise as to justify a judgment ousting the college of its corporate franchise. *State* v. *Mt. Hope College Co.*, 58 N. E. Rep. 799. See NOTES, p. 532.

CORPORATIONS — CONFIRMATION OF PROMOTER'S CONTRACT. — One acting in behalf of an intended company made a contract with the plaintiff, and the company after its incorporation adopted the agreement. *Held*, that the company is not bound by the agreement, a corporation being unable to adopt, ratify, or confirm a contract made in its behalf before incorporation. *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, 17 Times L. R. 117. See NOTES, p. 536.

CORPORATIONS — SALE OF ASSETS — ASSUMPTION OF LIABILITIES. — By statutory authority one corporation purchased the property and franchises of another corporation, the deed of sale containing a covenant by the buyer to assume and discharge all obligations and liabilities of the seller. *Held*, that the purchaser was not liable to the plaintiff for an injury to the plaintiff's property committed by the seller. *Capital Traction Co.* v. *Offutt*, 29 Wash. Law Rep. 18. See NOTES, p. 530.

CRIMINAL LAW — RECEIVING STOLEN PROPERTY — HUSBAND AND WIFE. — The defendant's husband brought home property stolen by him, the defendant knowing that the property had been stolen, and intending to enjoy the benefits of the theft. *Held*, that the jury being satisfied that she was not coerced, the wife may be convicted of receiving stolen property. *People* v. *Hartwell*, 55 N. Y. App. Div. 234.

Formerly a person receiving property knowing it to have been stolen was guilty as accessory after the fact, and although modern statutes have made the act a substantive crime, the true nature of the offence remains unchanged. WHARTON, CRIM. LAW, 10 ed § 982. A wife cannot be convicted as accessory after the fact to a crime committed by her husband. *Regina* v. *Manning*, 2 C. & K. 887, 904. 4 BL. COM. 39. Hence, in the absence of statutory changes in the wife's status in this respect, it must follow that she cannot be convicted of receiving stolen property from her husband. *Regina* v. *Brooks*, Dears. 184. The principal case may have been influenced by the rule in New York that husband and wife may be jointly convicted of this crime. *Goldstein* v. *People*, 82 N. Y. 231. Even if that rule be correct, and there is authority *contra*, *Regina* v. *Mathews*, 4 Cox, C. C. 214, the principal case should not be affected thereby, since the fact that husband and wife may jointly commit a crime does not affect the wife's inability to be an accessory after the fact to her husband's crime. This rests on totally independent considerations of policy.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO DEVISE. — The plaintiffs out of benevolence furnished support to an apparently destitute woman. At their request, which was induced by a suspicion that she was concealing some property, she executed a will in their favor, but subsequently destroyed it without their knowledge, and executed another in favor of third persons. The plaintiffs continued to support her until her death, when it appeared that she had a considerable amount of personal property. *Held*, that the obligation of the testatrix to devise her property to the plaintiffs was specifically enforceable in equity against the executor and devisees of the second will. *Anderson* v. *Eggers*, 47 Atl. Rep. 727 (N. J., Ch.).

The principal reason given for the decision seems to be an application of the rule of estoppel to representations as to future conduct. The only authority for this doctrine has its origin in an elaborate English *dictum*, contradicted by a later decision of the House of Lords. *Hammersley* v. *Biel*, 12 Cl. & Fin. 45, 88; *Jorden* v. *Money*, 5 H. L. C. 185, 214. But the facts of the principal case apparently show a valid contract, according to the intent of the parties, completed when support was actually furnished up to the death of the testatrix. A contract to devise real estate is almost everywhere, so far as possible, specifically enforceable after the promisor's death. *Johnson* v. *Hubbell*, 66 Am. Dec. 773, and note ib. 783. Strictly specific performance is of course impossible after the death, and before the death there is no breach; but the result is reached by a constructive trust. *Bolman* v. *Overall*, 80 Ala. 451, 455. No authority has been found for the case where the promisor leaves only personal property. But a decree that the executor account to the promisee for all the property which shall be found to exist is clearly so much more adequate than a judgment awarding damages estimated by a jury, that the extension of the doctrine to such cases may well be approved.

EQUITY — SPECIFIC PERFORMANCE — MISTAKE. — Land was sold at auction, under printed conditions containing a description of the premises and a provision that there be compensation for misdescriptions. At the sale the auctioneer distinctly made verbal corrections in the printed descriptions, which the purchaser did not hear. *Held*, that the purchaser cannot have specific performance with compensation for the misdescription. *In re Hare & O'More's Contract*, [1901] 1 Ch. 93.

Such verbal statements by the auctioneer would probably be, under the parol evidence rule, no defence to an action on this contract. *Shelton* v. *Livius*, 2 C. & J. 411. The fact, however, that there is a binding contract is not necessarily decisive as to specific performance. This remedy is largely discretionary with equity, and will not be granted where the enforcement of the contract is inequitable, because of fraud or mistake. The principal case is an instance of the application of this general rule. The buyer is trying to enforce a contract, different from that which the seller honestly and without fault supposed was being made; and there is therefore, both on principle and authority, such a case of mistake as to justify equity in refusing specific performance. *Manser* v. *Back*, 6 Hare, 443; *Malius* v. *Freeman*, 2 Keen, 25; *Quinn* v. *Roath*, 37 Conn. 16, 31.

EVIDENCE — BASTARDY PROCEEDINGS — EXHIBITION OF CHILD. — *Held*, that on a prosecution for bastardy, the exhibition to the jury of the child, under two years of age, for the purpose of showing its resemblance to defendant, was error. *State* v. *Harvey*, 84 N. W. Rep. 535 (Iowa).

It is frequently held that the child may be exhibited to the jury to show resemblance to the putative father. *Gaunt* v. *State*, 50 N. J. Law, 490; *contra*, *Clark* v. *Bradstreet*, 80 Me. 454. Undoubtedly, peculiarities of feature are often transmitted from parent to child, and where distinctive characteristics like differences in color appear, there seems good reason for allowing the exhibition. *Finnegan* v. *Dugan*, 96 Mass. 197; *Warlick* v. *White*, 76 N. C. 175. If the child is young, however, such evidence is ordinarily too uncertain to be of value. In bastardy proceedings, especially, the attitude of the jury is such that its admission is in general unfair and dangerous. The court in the principal case was bound by a previous decision allowing the exhibition of a child of two years. *State* v. *Smith*, 54 Iowa, 104. It could not therefore lay down a broader rule, but its decision is entirely sound in strictly limiting the previous case.

EVIDENCE — OPINION EVIDENCE — DYING DECLARATIONS. — Defendant relied on insanity as a defence to a prosecution for homicide. *Held*, that it was error to exclude the opinions of non-expert witnesses based on facts stated by them as to whether defendant was in his natural state of mind; but that there was no error in excluding deceased's dying declarations that he believed defendant was crazy and did not intend to kill him, since such declarations are mere statements of opinion. *State* v. *Wright*, 84 N. W. Rep. 541 (Iowa).

The better view, and that supported by the weight of authority, is that non-experts may state their opinion of a person's sanity when the facts upon which the opinions are based are known to the jury. *Connecticut Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Jamison* v. *People*, 145 Ill. 357. The admission of the witnesses' opinions in the principal case was therefore proper. But dying declarations are competent only in so far as the statements therein could have been given in evidence by the deceased had he lived. 1 GREENL. EVID. 16th ed. § 159. His statement also would have been admissible only if accompanied by the facts upon which it was based. *Grubb* v. *State*, 117 Ind. 277. Since here the jury could not know these facts, the declaration was properly excluded. The decision in the principal case is therefore correct on both points, but the reasons for the distinction are not adequately indicated.

EVIDENCE — PRESUMPTIONS — BURDEN OF PROOF. — A death-benefit certificate provided that it should be paid to the assured's widow, "and in case she died before him," then to his heirs. The assured and his wife both died in a common disaster. *Held*, that the fund should go to the heirs. *Balder* v. *Middeke*, 5 Chic. L. J. N. S. 325. See NOTES, p. 538.

FEDERAL JURISDICTION — REMOVAL OF CAUSES — SUIT AGAINST ALIEN AND CITIZEN. — The circuit courts of the United States are given jurisdiction over suits between citizens of different states, or between citizens of a state and citizens or subjects of a foreign state. Suit was brought by a citizen of Washington against a West

Virginia corporation and a foreign corporation. *Held*, that the circuit court has jurisdiction. *Roberts* v. *Pacific, etc. Co. et al.*, 104 Fed. Rep. 577 (Circ. Ct., Wash.).

A foreign corporation is held to be an alien, and may remove a suit into the Federal courts. *Terry* v. *Imperial, etc. Co.*, 3 Dill. 408. It is equally well settled that a domestic corporation chartered by a state other than the plaintiff's has the same right. *Railway Co.* v. *Whitton*, 13 Wall. 270,283. Accordingly had suit been brought against the two defendants separately there could be no question of the jurisdiction of the court. This might seem to be conclusive of the present case. *Strawbridge* v. *Curtiss*, 3 Cranch, 267. But it is contended that as the defendants when so joined do not come within the precise words of the statute, the circuit court cannot take jurisdiction. 1 Dest. Fed. Proc., 9th ed., p. 472; Black Dill. Rem. Caus. §§ 68, 84; *Tracy* v. *Morel*, 88 Fed. Rep. 801 (*semble*). The only previous decision on the point, however, is in accord with the principal case, *Ballin* v. *Lehr*, 24 Fed. Rep. 193, and this position seems preferable. Admitting that the statute should be strictly construed, *Daugherty* v. *Western Union, etc. Co.*, 61 Fed. Rep. 138, no construction should be adopted which will produce absurd results. *Oates* v. *National Bank*, 100 U. S. 239, 244. Clearly the act was intended to cover such cases.

INSURANCE — REINSURANCE — RIGHTS OF POLICY HOLDER AGAINST REINSURER. — By a contract of reinsurance, the reinsurer assumed all liability under outstanding policies, the contract providing, however, that it was to be effective only between the parties thereto, and that no policy holder should enforce it against the reinsurer, who was to pay only claims proved in an action against the reinsured. *Held*, that an action lies by a policy holder against the reinsurer immediately upon the destruction of the property. *Shoaf* v. *Palatine Ins. Co.*, 37 S. E. Rep. 451 (N. C.).

The ordinary reinsurance contract is a contract of indemnity between the reinsurer and the reinsured, and creates absolutely no relation between the former and the original policy holders. *Herckenrath* v. *American, etc. Ins. Co.*, 3 Barb. Ch. 63; *Goodrich & Hick's Appeal*, 109 Pa. St. 523. It is possible, of course, for the reinsurer to agree to pay the policy holders directly, who thereby, under the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, will get a right of action against the reinsurer. *Glen* v. *Hope Mutual L. Ins. Co.*, 56 N. Y. 379; *Johannes* v. *Phœnix Ins. Co.*, 66 Wis. 50. The doctrine of *Lawrence* v. *Fox*, *supra*, does not, however, create a right in favor of one who, though he would derive a benefit from the performance of a contract, is not in fact made the beneficiary of it. *Durnherr* v. *Rau*, 135 N. Y. 219. So far from being beneficiaries, the policy holders in the principal case were by the very terms of the contract excluded from all rights. Moreover, the decision would be indefensible, even if they were beneficiaries, because the plaintiff's claim not having been proved in an action against the reinsured, no breach of contract by the reinsurer could be shown.

MORTGAGE — ASSIGNMENT — RECONVEYANCE BY ASSIGNEE. — A mortgagor of a house put her solicitor in funds for the purpose of paying off the mortgage debt. The solicitor appropriated the money to his own use. Later he took a transfer of the mortgage debt and security to himself in his personal capacity, and in turn transferred the same to the defendant, who acted in good faith, paying value, but gave no notice to the mortgagor. *Held*, that the mortgagor may have a reconveyance. *Turner* v. *Smith*, 49 Weekly Rep. 186 (Ch. D.).

Where the mortgagor has no notice of the transfer of the mortgage debt, it is clear that any payments by the mortgagor to the mortgagee, whether made before or after the assignment, will be good against the innocent transferee for value. *Williams* v. *Sarrell*, 4 Ves. 389. Moreover, the assignee takes subject to any set-off the obligor may have against the obligee. *Norrish* v. *Marshall*, 5 Madd. 475, 481. For though the mortgage bond has not been delivered up, the payment to or set-off against the obligee gives rise to a defence to any action thereafter, whether brought by the obligee in his own right or by the assignee suing in his name. Obviously the result must be the same when payment is made to or a set-off exists against an assignee with the beneficial interest. An assignment is the grant of a power of attorney, and any defence which exists against an assignee who holds in his own right must be equally good against the obligee, for payment to or a set-off against such an attorney is in contemplation of law a payment to or set-off against the grantor of the power. Now in the principal case the moment the bond became the property of the solicitor, it belonged in equity to the mortgagor, she having a complete set-off against the present owner of the mortgage debt. In other words, when the bond came into the hands of the solicitor as purchaser, there was a good defence to any action founded on the obligation running

to the mortgagee. This defence existed when the transfer was made to the defendant, and hence as assignee he took subject to it. The debt was extinguished in equity and was no longer a subsisting charge upon the property; hence in granting a reconveyance to the mortgagor the principal case is perfectly sound.

PROPERTY — COVENANT AGAINST INCUMBRANCES — PAROL PROMISE TO SAVE HARMLESS. — Defendant conveyed land to the plaintiff with warranty against all incumbrances. At the time there were outstanding two notes against the defendant, which constituted a lien on the land. These notes the plaintiff undertook to pay off, and no mention of them was made in the deed. He failed to pay. The land was sold by foreclosure, and the plaintiff brought action on the covenant against incumbrances. *Held*, that the plaintiff's promise is a defence, its effect being, not to make an exception to the terms of the deed, but to show that, as between the parties, the incumbrance had been paid off, so that there was no breach. *Johnson* v. *Elmen*, 59 S. W. Rep. 253 (Tex., Sup. Ct.). See NOTES, p. 533.

PROPERTY — FIXTURES — CONSTRUCTIVE SEVERANCE. — The owner of a greenhouse and the land on which it stood sold the greenhouse and leased the land to the vendees. Subsequently she mortgaged the land to the plaintiff, who had no notice of the sale. *Held*, that on foreclosure the mortgagee was not entitled to the greenhouse. *Royce* v. *Latshaw*, 62 Pac. Rep. 627 (Colo.). See NOTES, p. 534.

PROPERTY — NUISANCE — RECOVERY BY LESSEE. — A lessee took property, knowing that it was affected by a private nuisance. *Held*, that damages are recoverable by the owner of the freehold only, and not by the lessee. *Bly* v. *Edison Electric Illuminating Co.*, 54 N. Y. App. Div. 427.

It is clear that where a lease is taken prior to the creation of a nuisance, the tenant may recover for injuries to his possessory interest. *Sherman* v. *Fall River Iron Works Co.*, 2 Allen, 524. The ground of the decision in the principal case is, that where a lease is taken with notice of a nuisance, it must be presumed that the parties had the nuisance in mind, and estimated the value of the premises incumbered by it. Accordingly the injury is to the rental value solely, and the lessor has the exclusive right to sue. This rule seems to be the settled law of New York. *Kernochan* v. *New York, etc. R. R. Co.*, 128 N. Y. 559. And yet it is admitted that in a proper case the tenant is entitled to an injunction. *Pach* v. *Geoffroy*, 67 Hun, 401. Therefore as the nuisance could have been thus abated at any time during the tenancy, it seems unfair to presume that the parties contemplated its continuance in fixing the rental value. Clearly the possessory interest of the lessee has actually been injured, and for this an action at law should be allowed, although it may be that by the terms of the contract between them the lessee cannot retain the damages against the lessor.

SURETYSHIP — CONTRIBUTION — DISCHARGE OF CO-SURETY. — A, B, C, and D were sureties on a joint and several note for $4000. A, B, and C each paid $1000 to the obligee. A and B were later compelled to pay D's share. D executed three notes to A, B, and C, each for one third of his share of the original debt, payable in one year. C refused to be bound by this transaction with D, who was hopelessly insolvent, and A now sues C for a moiety of C's third of D's share. *Held*, that A cannot recover anything against C. *Clark* v. *Dane*, 28 So. Rep. 960 (Ala.).

As among themselves each co-surety is a principal to the extent of his share of the joint and several debt, and the others are as to such share sureties, each for his proportionate amount. *Brogg* v. *Patterson*, 85 Ala. 233, 235. Hence, in the principal case, D became the debtor of A and B upon their paying his share of the joint debt, while C was a surety for one third of the amount. An action would lie immediately. Now the fair interpretation of the settlement entered into with D by A and B is that they bound themselves not to proceed against him, either directly or indirectly for one year. The effect of this is to discharge C, for if a creditor agrees to give time to his principal, the surety is excused, it being immaterial whether the act of the creditor would benefit or injure the surety. *Samuell* v. *Howarth*, 3 Mer. 272. The decision in the principal case is therefore clearly sound. See also *Cummings* v. *May*, 91 Ala. 233, 239.

SURETYSHIP — INJURIES TO EMPLOYEES — CONTRACT OF INDEMNITY. — An insurance company contracted to indemnify an employer for all sums actually paid by him in satisfaction of judgments obtained against him by employees injured through his negligence. *Held*, that where the employer is bankrupt, the trustee in bankruptcy

by a bill in equity may compel the insurance company to pay the amount of a judgment directly to the injured employee. *Beacon Lamp Co.* v. *Travellers' Ins. Co.*, 47 Atl. Rep. 579 (N. J., Ch.).

The court treats this case as analogous to cases where the grantee of land assumes the mortgage debt, in which the grantee becomes in equity the principal debtor, and the grantor a surety only. *Klapworth* v. *Dressler*, 13 N. J. Eq. 62; *Keller* v. *Ashford*, 133 U. S. 610. In these cases, however, the promise to pay the debt to the mortgagee creates an equitable obligation running directly to him; while in the principal case the promise does not run to the employee, and here therefore his rights must be worked out through his employer. But to the latter the defendant is under no liability until the judgment debt has been paid. Accordingly, on principle, the trustee should first pay to the employee from the assets the proper percentage of his claim. Then he would be entitled to be reimbursed by the insurance company, and the amount thus obtained would form a new fund to be divided ratably. For any amount paid to the employee from this second fund, the insurance company must again reimburse the trustee, and this process would continue until the amount paid to the employee would be too small to be considered legally. Since the final result can be calculated in advance, the whole case may be settled in one decree. This rule has been followed in a similar case. *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App. Cas. 366; *contra*, *Ex parte Waring*, 2 Glyn & J. 621. See AMES, CAS. ON SUR. p. 624, note 1; p. 631, note 1; 1 HARV. LAW REV. 326, 337.

SURETYSHIP — RELEASE OF PRINCIPAL OBTAINED BY FRAUD — LIABILITY OF SURETY. — At the maturity of a note on which the principal and surety were bound, the principal retired it by a new note on which the surety's name was forged. *Held*, that action would lie against the surety on the original note. *McIntyre* v. *McGregor*, 21 Canadian L. T. Rep. 25.

The result reached is clearly correct, and is in accord with the authorities. *West Phila. Nat. Bank* v. *Field*, 143 Pa. St. 473; *Allen* v. *Sharpe*, 37 Ind. 67. Such cases are generally supported by saying that payment in forged paper is not a valid payment, and that therefore the original debt remains in full force. *Bank* v. *Buchanan*, 87 Tenn. 32. On principle, however, the relief afforded to the plaintiff in such cases seems to rest on equitable considerations. The legal liability of the surety being terminated by the surrender or cancellation of the original instrument, equity will not allow him unjustly to take advantage of that fact to the detriment of the creditor. If, however, the surety has, in reliance on the legal extinguishment, in good faith changed his position, he will not be liable, since as between two persons having equal equities, one of whom must suffer, the one having the legal right will prevail. 4 HARV. LAW REV. 297. *Kirby* v. *Sandis*, 54 Iowa, 150; *contra*, *Lyndonville Nat. Bank* v. *Fletcher*, 68 Vt. 81. Since in the present case, the surety had not changed his position, he was properly held liable.

TORTS — ASSUMPTION OF RISK — KNOWN DEFECTS. — Deceased was a ferryman employed by defendants to operate a wire ferry. The rope connecting the boat with the wire was frayed, and deceased had applied to defendants for a new rope, though without stating the necessity of prompt action. As a result of the parting of the rope, deceased was drowned. *Held*, that his knowledge of the danger rendered him contributorily negligent. *Chesapeake, etc. Ry. Co.* v. *Sparrow's Admin.*, 37 S. E. Rep. 302 (Va.).

Knowledge of a defect, in such a case, is more properly regarded as showing consent by the servant to work under the existing conditions than contributory negligence on his part. In other words the defence negatives the duty, on the maxim, *volenti non fit injuria*, rather than excuses its breach. *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. Later English decisions, perhaps influenced by the stringent provisions of the Employers' Liability Act, distinguish between injuries to one "*scienti*" and "*volenti*," holding that knowledge of a defect does not necessarily imply consent to assume the risk. *Smith* v. *Baker*, [1891] App. Cas. 325; *Yarmouth* v. *France*, 19 Q. B. D. 647. The practical value of this distinction is not apparent. Where the defect is as obvious to the servant as to the employer, and no circumstances appear which excuse the servant for continuing work after knowledge of the defect, the master should be excused on the ground that the servant assumes the risk. *Meador* v. *Lake Shore, etc. Ry. Co.*, 138 Ind. 290; *Sweeney* v. *Berlin, etc. Co.*, 101 N. Y. 520. Judged by this standard, the result reached in the principal case is correct, though the decision is not rested upon the proper grounds.

TORTS — LIABILITY OF EMPLOYER — INJURY TO SERVANT OUTSIDE HIS DUTY. — The plaintiff's intestate, a brakeman, in pursuance of a custom known to the defendant, voluntarily left his place of employment to ride upon the engine, and was killed by the negligent derailing of the locomotive. *Held*, that the intestate was outside of his duty, and at fault as a matter of law. *Chattanooga, etc. R. R. Co.* v. *Myers*, 37 S. E. Rep. 439 (Ga.).

Decisions like that of the principal case are generally said to rest upon the contributory negligence of the employee. *Baltimore, etc. R. R. Co.* v. *Jones*, 95 U. S. 439; *Warden* v. *Louisville, etc. R. R. Co.*, 94 Ala. 277. Upon principle, however, it seems sounder to say that an employee, who for purposes of his own voluntarily goes to parts of his master's premises outside his employment, thereby puts himself where the employer's duty to provide him a reasonably safe working place does not extend, and he becomes a mere licensee with only the rights of such licensee. *Wright* v. *Rawson*, 52 Iowa, 329. Where, however, the facts show notice by the defendant of the plaintiff's presence, he owes a duty to him as licensee not to harm him through negligence. *Gallagher* v. *Humphrey*, 6 L. T. (N. S.) 684. If such negligence is shown, then the doctrine of contributory negligence may be legitimately invoked to excuse the defendant for his tort. As it was admitted that the defendant was negligent in the principal case, the court should therefore have left two questions to the jury, whether the defendant had notice of the plaintiff's presence, and, if so, whether the plaintiff was himself negligent in riding on the engine.

TORTS — NEGLIGENCE — LAW AND FACT. — *Held*, that the question whether uncontradicted evidence, if believed, shows negligence, is a question of law for the court. *Haltom* v. *Southern Ry. Co.*, 37 S. E. Rep. 262 (N. C.).

The rule, applicable to most cases of negligence, that the law requires such care as men of ordinary prudence would use under similar circumstances, is plainly a rule of law. In applying it to the circumstances of a particular case, two questions arise: what amount of care would men of ordinary prudence use under such circumstances; and did the defendant use that amount of care? Both are purely questions of fact. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408. Whether the former of these questions, which the principal case erroneously calls a question of law, should be decided by the court is another matter. Certainly it should be, like any other question of fact, whenever reasonable men could not honestly differ in opinion. *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 193. And a long succession of verdicts on practically the same facts will often enable a judge to decide, upon this principle, cases which, but for past experience, ought to have gone to the jury. From this, by an unfortunate transition, we reach such absolute and artificial rules of law as the "look and listen" rule. 14 HARV. LAW REV. 234. But in general the question, depending as it does on the common sense of the community, is emphatically one for the jury. The authorities, in spite of many loose expressions, sustain this view. 1 SHER. & RED. NEG. (5th ed.) ch. 4.

TRUSTS — BENEFICIAL OWNERSHIP — OBLIGATION TO INDEMNIFY TRUSTEE. — *Held*, that a mere trust relation imposes on the beneficial owner a personal obligation to indemnify the trustee for expense consequential on the legal ownership of the trust *res*. *Hardoon* v. *Belilios*, 83 L. T. Rep. 573. See NOTES, p. 539.

TRUSTS — DEATH OF CESTUI — BONA VACANTIA. — A testator died without heirs, devising land to a tenant for life, with no devise over. The land was sold, and the proceeds held by trustees appointed under the Settled Land Act, which provides that such funds "shall for all purposes of disposition, transmission, and devolution be considered as land." 45 & 46 Vict. c. 38, s. 22, sub-s. 5. *Held*, that on the death of the tenant for life, the fund vests in the crown as *bona vacantia*. *In re Bond*, [1901] 1 Ch. 15.

When the *cestui que trust* of personalty dies without next of kin, the State takes as *bona vacantia*. *Middleton* v. *Spicer*, 1 Bro. Ch. 201. In case of trusts of realty, however, it is held in England that, on failure of the heirs of the *cestui que trust*, the trust disappears, and the trustee holds beneficially on the theory that there is no tenure in equitable interest and thus there can be no escheat of such estates. *Burgess* v. *Wheate*, 1 W. Bl. 123; *Taylor* v. *Haygarth*, 14 Sim. 8. The English courts appear not to have recognized that the doctrine of *bona vacantia* could be applied here as well as in case of personalty, though that of escheat might not be. 4 LAW QUAR. REV. 330, 336. This result has been reached in America. *Matthews* v. *Ward*, 10 Gill & J. 443. In the principal case, the court reaches the correct result by treating the fund as personalty in direct opposition to the terms of the statute. It cannot, therefore, be

considered as overruling *Burgess* v. *Wheate*, *supra*, though it may indicate a desire to limit its scope.

WILLS — LEGACY — REDUCTION BY SUBSEQUENT NON-TESTAMENTARY ACTS. — A testator provided that all advances to any child, evidenced by certain papers subsequently to be made, should be deducted from that child's legacy. *Held*, that this is not an attempt to alter or complete the will by papers informally executed, and hence the provision is valid. *In re Moore*, 47 Atl. Rep. 731 (N. J., Prerog. Ct.).

A testator cannot in his will reserve the right to alter or complete it by a subsequent unattested paper. *Thayer* v. *Wellington*, 9 Allen, 283, 291. But he may direct that the disposition of certain property, completely fixed by the will, shall be altered by the happening of subsequent extrinsic events. *Roberts* v. *Corning*, 89 N. Y. 225, 241. Moreover the occurrence of such events may be entirely within the control of the testator. *Stubbs* v. *Sargon*, 3 Myl. & C. 507. The distinction, therefore, is between acts not testamentary in character which affect but do not complete the will, and acts of a testamentary nature that actually complete an unfinished will. *Langdon* v. *Astor's Executors*, 16 N. Y. 1. If the event, upon the occurrence of which the amount of a legacy is to be altered, is of a non-testamentary character, such as an advance of money to the legatee; the mere fact that the testator requires the happening of it to be evidenced in a particular way, as by a writing, cannot change its legal effect. *Holmes* v. *Coates*, 159 Mass. 226. The decision in the principal case, therefore, is obviously correct.

REVIEWS.

THE LAW OF COMBINATIONS. By Arthur J. Eddy, of the Chicago Bar. Chicago: Callaghan & Co., 1901. 2 vols. pp. xxxviii, 1540.

This useful and admirable book embraces a number of related subjects of great present importance: the law of Monopolies, of "Trusts" and other Combinations of Labor and Capital, the law of Conspiracy, the law of Contracts in restraint of trade, and a commentary on the Federal and State Anti-Trust legislation; together with an appendix, giving the Incorporation laws of New Jersey, West Virginia, and Delaware. Each subject is examined historically, the present business conditions are described, all authorities bearing upon the subject are examined carefully and at length, and the conclusions of the author are clearly stated. One may find here discussions on "cornering" the market, on trade unions, strikes and boycotts, "trusts," restraint of trade, anti-trust laws, and "government by injunction." The book is a monument of research, original and sensible in argument, and thoroughly sound in its conclusions. It will prove most useful for the lawyer in active practice because of its full collection of authorities and its copious extracts from the opinions in cases which a lawyer without a large library might find difficult of access. To the student of law the study of the author's conclusions will be instructive and enlightening, and to the political thinker the comments upon economic questions of present interest will well repay study. These great merits are accompanied with a few defects of form and detail which it seems almost ungracious to point out. Mr. Eddy has treated his subject so fully that a consecutive reading of the book leaves one somewhat confused as to the main trend of the discussion. The material has not been thoroughly digested, and some of the arguments are repeated more than once in different parts of the book. The logical scheme of the work may, however, be grasped by reading the preface and conclusion and then a few principal chapters.